Supreme Court of the United States

OCTOBER TERM, 1927

No. 235

NEWS SYNDICATE COMPANY, INC.,
Plaintiff in Error,
against
THE NEW YORK CENTRAL RAILROAD COMPANY, *et al.*,
Defendants in Error.

MOTION FOR LEAVE TO FILE PETITION FOR RECONSIDERATION OR FOR REHEARING.

Now come the defendants in error in the above case and move for leave to file therein the attached petition for reconsideration or for rehearing, notwithstanding the expiration of twenty-five days from the entry of judgment therein, and in support of their motion respectfully show:

I. The opinion of this Court was filed November 21, 1927.

II. For the reasons which more fully appear in the petition, so much of the opinion as declares or implies that the failure of railroads to publish rates from the international boundary contravenes the provisions of the Interstate Commerce Act, constitutes a pronouncement of a

novel principle upon a question of great concern to the railroads generally and to shippers engaged in transportation between the United States and adjacent foreign countries. Because of the far-reaching effect of the principle, due consideration of the decision has made necessary numerous conferences with counsel and traffic officials of the railroads directly involved in the case and of other railroads affected thereby, an examination of the decisions and records of the Interstate Commerce Commission and conferences with its staff, and conferences with representative shippers engaged in such transportation. Although the defendants-in-error have proceeded with all diligence in these matters, they could not be adequately attended to within the twenty-five days allowed by Rule 30 of the rules of this Court.

Wherefore, defendants-in-error pray that the Court may allow this petition to be filed.

Respectfully submitted,

PARKER MCCOLLESTER,
FREDERIC D. MCKENNEY,
Attorneys for defendants-in-error, petitioners.

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THE NEW YORK CENTRAL RAILROAD COMPANY, *et al.*,
Defendants in Error.

PETITION FOR RECONSIDERATION OR FOR REHEARING.

Now come the several railroad companies defendants below, and move this honorable Court to reconsider and if so persuaded, to reform so much of its opinion delivered in the above case on the 21st day of November, 1927, as declares, indicates or implies that in the circumstances and facts disclosed by the certificate of the Circuit Court of Appeals for the Seventh Circuit it was and is the duty of said interstate carriers to establish, by publishing in the manner prescribed by the Act to Regulate Commerce as enacted and/or as it now exists, specific rates from the international boundary (between the United States and Canada) and a point (New York City) or points within

the United States; that the failure to publish such rates from the international boundary contravened the provisions of the Interstate Commerce Act, and further, that it rendered the United States carriers liable for damages sustained because of such failure, which damages might be measured by the difference between the joint through rates actually collected from a point in Canada to a point in the United States and joint through rates determined by the Commission to be reasonable. In the alternative, defendants-in-error move this honorable Court to accord them a rehearing or reargument in order that the questions presented may be more fully discussed than is here possible.

The principles announced are novel, are contrary to the policy of and practice prevailing before the Interstate Commerce Commission, and if maintained, at least in their present form, involve the question of the necessity of amending or filing supplements to many and possibly all tariff schedules on file with the Commission wherein rates have been established for transportation movements which cross the international boundary, and of entirely changing the methods of publishing and determining both freight and passenger charges on international transportation which have been in effect for many years.

Neither before the Commission, nor in the Trial Court, nor in the Circuit Court of Appeals, nor by the questions certified, is suggestion made that the railroad companies now before the Court were derelict in their statutory duty because of failure to establish a rate or rates from the international boundary as such. Such a failure was not alleged as the basis for the claim for damages presented to

the Commission, such a failure was not found by the Commission to exist, and it does not appear from the Commission's reports included in the certificate that the Commission's reparation order, whose validity is here in issue, was an order for the payment of damages caused by such a failure. In fact, the contrary appears, for the Commission cited as the ground for its reparation order its decision in *International Nickel Co.* v. *Director General*, 66 I. C. C. 627 (Cer. p. 19), wherein it said:

> "The charging of an unreasonable rate is a tort (*Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, 534), and the parties to such rate are jointly and severally liable for any resulting damage."

Moreover, it does not appear from the pleadings or the Certificate itself that as to this transportation, any one of the defendant companies owns or operates rails from the exact international boundary line, that it actually transported any of the shipments involved from the boundary itself, or that it has at any time been required by the Commission or any other authority to join in a through rate or establish a rate from the exact boundary.

So far as known to us or has been disclosed by such investigation as has been possible of the tariff files of the Interstate Commerce Commission, no tariff schedule filed with the Commission by any carrier in the United States specifies a rate or rates from or to the international boundary line by name.

To publish tariff rates to and from any such spot as where a railroad crosses the international boundary would, under the usual practice before the Commission and the

decided cases, imply a willingness as well as an ability on the part of a carrier to receive, care for, and deliver freights tendered at or consigned to such a point. So far as known to us, no carrier subject to the Interstate Commerce Act has a freight station or maintains an agent or other facilities exactly upon an international boundary line, and in many instances, such as that here, no such facilities could reasonably be established.

At the Niagara frontier the point where the railroads from Canada cross the international boundary is at or approximately in the middle of a bridge, where obviously the carriers have not and cannot reasonably have facilities to receive and deliver freight.

Section 6 (1) of the Act requires carriers to file and publish schedules

> "showing all the rates * * * and charges for transportation *between different points on its own route* and between points on its own route and points on the route of any other carrier by railroad * * * when a through route and joint rate have been established." (Italics Supp.)

It has heretofore been thought that "points" within this requirement, comprehended freight stations and not imaginary points along a railroad's line.

In the present case the railroad companies defendants below received the shipments at their points of interchange with the Canadian carrier, which were points as near the international boundary as freight receiving facilities were practical. Moreover, they actually published rates on newsprint paper from their Niagara frontier stations which

would include their interchange points, so that there was no failure to publish rates from the boundary unless the provisions of the Act are to be interpreted as requiring the publication of rates from the spot where a carrier's rails cross the imaginary line of the frontier.

Section 6, paragraph (6) of the Interstate Commerce Act, provides:

> "The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be convenient."

and paragraph (3) of the same section provides:

> "Provided that the Commisssion may in its discretion * * * modify the requirements of this section in respect to publishing, posting and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions; provided further, that the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges and classifications."

The Commission, by its tariff circular 18-A and supplements thereto, has prescribed the manner and form in which tariffs naming rates shall be filed and published. It has therein made no requirement that rates for transportation between the United States and Canada shall be published to or from the boundary.

Indeed, the policy of the Interstate Commerce Commission as indicated by occasional expressions which appear

here and there in its reported opinions seems to have been and to be to encourage the establishment of joint rates for all traffic crossing the International Boundary. For example, in *International Paper Co.* v. *Delaware & Hudson Co., et al.*, 33 I. C. C. 270, 273 (bottom), it was said:

> "We cannot require the maintenance of joint rates from Canada into the United States nor control the charges that carriers in Canada may make for transportation services in that country. We might require the defendants to cease and desist from continuing the joint rates complained of and to establish their own rates for the service within the United States. The traffic would then move on combinations of rates. We see no occasion for doing this, nor do we see how that action could benefit these complainants. * * *
>
> "Joint rates from and to Canada are a convenience to the public and to carriers. They tend to promote easy and prompt movement of traffic and should be continued unless they are unreasonable or otherwise unlawful. We do not conceive that merely because the rates are published as joint through rates we have power to determine what the railroads of Canada shall charge for transportation of freight to the border."

Neither in the cited case nor in *Philip Carey Mfg. Co.* v. *Grand Trunk Western, &c.*, 36 I. C. C. 203, where the joint rates complained of were held to be unjustly discriminatory against complainants, nor in *International Nickel Company* v. *Director General, as Agent, &c.*, 66 I. C. C. 627, where the joint rates complained of were held to be unreasonable and reparation awarded, nor in many other cases has the Commission required the participating Amer-

ican carriers to establish rates to or from the International Boundary, in lieu of joint rates.

And in the case at bar the Commission expressly indicated its expectation and desire that a joint through rate from Thorold, Ontario, to New York City, should be established (Cer. 23, 24), and disclaimed any intention of requiring the publication of rates from the boundary (Cer. 19). This practice of the Commission is of especial significance, since the Commission is required by Section 12 of the Interstate Commerce Act to enforce its provisions, and since this Court has recognized the importance to be attached to the Commission's interpretation of the Act. *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361, 401. And Congress, though it must be presumed to have known the practice and decisions of the Commission during all these years, has not amended the tariff publishing provisions of the Act to require rates to be published to and from the international boundaries as such.

The foregoing arguments have not heretofore been advanced in this case, since it has not been considered that the case presented the question whether the failure to publish rates from the international boundary should be held to constitute a violation of the Interstate Commerce Act, no such finding having been made by the Commission and its reparation order here in suit not being an order for damages caused by such a violation.

If this question be in issue, there is more that could be said upon it. For instance, there is presented the question whether, assuming that the failure to publish rates from the boundary is a violation of the Act, the damages caused thereby may properly be measured by the amount

by which the Commission determined the through rate to be unreasonable. It would seem that the damages caused by such a violation would be the difference between the charges actually paid and the charges which the shipper would have paid had rates been published to and from the boundary, and it seems to us that it does not necessarily follow that if the Canadian carriers had published a rate up to the boundary and the American carriers had published a reasonable rate from the boundary to New York, the total charges would have been different from those which the shippers actually paid, or would have been less in the exact amount by which the Commission awarded damages on a different theory.

There is the further question whether, since in this case it was the Canadian carrier that hauled the freight from the exact boundary a few hundred yards to the interchange point, the American carrier was guilty of any violation in not publishing rates from the boundary, when it does not appear and has not been found that the Canadian carrier was willing to publish such a rate and the American carrier refused so to do.

For these reasons it is believed that if the question of the existence of such a violation is here in issue, it may be desirable to have further argument thereon in order that the implications involved may be fully discussed.

However, it may be that notwithstanding the above, the answers heretofore given by the Court to the questions certified would remain unchanged. Our chief concern is not with the answers themselves, but with the desire to obviate, if possible, the uprooting of a rate-making practice which, with the active concurrence of the Commission,

has prevailed without question on the part of shippers and carriers through many years, and the initiation at this late date, without a full discussion and examination of its desirability, of the practice of establishing rates to and from imaginary points on the international boundaries, which practice may lead into many and possibly as yet unsuspected difficulties.

Respectfully submitted,

PARKER MCCOLLESTER,
FREDERIC D. MCKENNEY,
Attorneys for defendants-in-error, petitioners.

January 3, 1928.

I, PARKER MCCOLLESTER, of counsel for defendants-in-error, petitioners, hereby certify that this motion and petition are presented in good faith and not for delay.

PARKER MCCOLLESTER.